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No. 84-914

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ST. LOUIS SOUTHWESTERN RAILWAY CO.,
Petitioner,

vs.

ROBERT WAYNE DICKERSON,
Respondent.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS EASTERN DISTRICT

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In order to present its Reply Brief in the most concise and logical fashion, Petitioner will reply to each portion of Respondent's Brief in sequence.

JURISDICTIONAL STATEMENT

Respondent's assertion that Petitioner has failed to adequately state jurisdictional grounds is meritless. Petitioner has cited 28 U.S.C. §1257(3). That statute provides in part that this Court has jurisdiction to review "final judgments or decrees rendered by the highest court of a state . . . (3) By Writ of Certiorari, . . . where any title, [or] right . . . is specially set up or claimed under the Constitution . . . or statutes of . . . the United States." Moreover, Rule 17 of this Court's Rules of Appellate Practice states that this Court, in determining whether to issue a Writ of Certiorari, will consider: "(b) When a state court of last

resort has decided a federal question in a way in conflict with the decision . . . of a Federal Court of Appeals; (c) When a state court . . . has decided a federal question in a way in conflict with applicable decisions of this Court." Petitioner makes clear in its Jurisdictional Statement that it is claiming that certain instructions in the Missouri Approved Instruction system are denying it rights guaranteed by the United States Constitution and by the decision of this Court and the Federal Courts of Appeal. As stated, these assertions are sufficient to invoke this Court's jurisdiction. See *Seaboard Air Line Ry. v. Padgett,* 236 U.S. 668, 35 S.Ct. 481, 59 L.Ed. 777 (1915) (erroneous declaration of federal law by the highest court of a state constitutes grounds for issuing a Writ of Certiorari). Supreme Court Rule 21 requires *a concise statement* of the ground on which jurisdiction of the Court is invoked. The points made in the Jurisdictional Statement are amplified in the argument portion of the Petitioner's Brief in support of its Petition for Writ of Certiorari.

Consequently, Petitioner's Jurisdictional Statement is adequate to invoke the jurisdiction of this Court.

Although Respondent purports to follow more closely this Court's Rules of Appellate Practice, his Jurisdictional Statement is far from concise. It occupies more than five (5) pages of his twenty (20) page brief. After the first one and one-half pages of the Jurisdictional Statement, Respondent obviously indulges in arguing the merits of the case. (See Respondent's Brief pp. 3-6). Many of these arguments are repeated in Respondent's argument portion of his brief.

Respondent's assertion that the Questions for Review raised by Petitioner were not timely raised in the courts below is groundless. Moreover, the decisions of this Court cited by Respondent on this point, deal with situations where the point was raised for the first time in this Court and where no lower court had entertained or passed upon the issue. However, where the state court decides a question proper for this Court's jurisdiction, the Court can review the issue. *Illinois v. Gates,* 76

L.Ed.2d 527, 536, ____ S.Ct. ____ (1983); *McGoldrick v. Compagnie Generale Transatlantique,* 309 U.S. 430, 434, 60 S.Ct. 670 (1940). As will be shown below, and in addition to the illustration in Petitioner's Brief, the points were properly presented to all lower courts and the Missouri Court of Appeals ruled on all these points.

Respondent makes the general assertion of untimeliness and then fails to support it. He argues about sufficiency of evidence for the tendered (but refused) present value instruction. However, no evidence of present value is necessary; the jury can decide that issue for themselves. (See also *Duncan v. St. Louis-San Francisco Railway,* 480 F.2d 79, 87 (8th Cir. 1973), see also *infra,* pp. 7 - 8). Next, Respondent says "Petitioner did not preserve its objection nor raise the federal issue it is now claiming." (Respondent's Brief in Opposition at page 3.) Although Respondent never identifies what "federal issue" he refers to, Petitioner reminds the Court that in Paragraph 10(a) of its Motion for New Trial (See Appendix G of Petitioner's initial Brief), Petitioner objected to the trial court's failure to give the present value instruction it tendered as against "the defendant's rights under the FELA and the federal common law pertaining thereto."

Perhaps most importantly though, on the issue of whether this point of error was preserved for appellate review, is that the Eastern District Missouri Court of Appeals ruled on the trial court's refusal to give a present value instruction. *Dickerson v. St. Louis Southwestern Railway Co.,* 674 S.W.2d 165, 170 (Mo. App. 1984). In Missouri Appellate Courts, like every other jurisdiction, no review or ruling will be made on points of error the Appellate Courts finds are not properly raised and preserved. *E.g., Lincoln Credit Co. v. Peach,* 636 S.W.2d 31, 36 [12] (Mo. banc 1982). In ruling on this point the *Dickerson* court relied specifically on language in *Bair v. St. Louis-San Francisco Railway Co.,* 647 S.W.2d 507 (Mo. banc 1983), and stated: "the Missouri Supreme Court has held that '. . . a present value in-

struciton was not appropriate under M.A.I.' " *Dickerson v. St. Louis Southwestern Railway Co.,* 674 S.W.2d at 170. It is interesting to note that Respondent chose not to make this same argument regarding the alleged failure to preserve the issue for appellate review to the Missouri Court of Appeals in his brief there. Nevertheless, now that the Missouri Court of Appeals has held that the Missouri Supreme Court is correct that the M.A.I. system has no room for a present value instruction, it is an erroneous decision in conflict with the decisions of this Court (see Petitioner's initial Brief, Reasons for Granting the Writ, pp. 7-10 for authority and discussion).

Respondent also asserts that Petitioner failed to preserve for review its second Question Presented for review (involving M.A.I. 8.01 and M.A.I. 8.02). Before the Missouri Court of Appeals, Respondent claimed that Petitioner failed to adequately preserve this issue for appellate review. See Appendix M, hereto, which is pp. 35-36 of Respondent's Brief filed with the Missouri Court of Appeals. The Missouri Court of Appeals must have ruled that the point was preserved for review because it ruled on the point. See, *Dickerson v. St. Louis Southwestern Railway Co.,* 674 S.W.2d at 171 [11]. Again, the *Dickerson* court relied specifically on the Missouri Supreme Court and quoted its holding in *Bair v. St. Louis-San Francisco Railway Co.,* 647 S.W.2d, 507, 510 [3] (Mo. banc 1983): "This instruction [M.A.I. 8.02] is mandatory to the exclusion of all others under the M.A.I." *Dickerson v. St. Louis-San Francisco Railway Co.,* 674 S.W.2d at 171 [11].

Respondent then attempts to divert this Court's attention with a discourse on the Missouri Supreme Court's philosophy on when it will reverse cases for instructional error. For at least two reasons, Respondent's position is fatally flawed. First, Missouri Supreme Court Rule 70.03 provides that an objection to instructions is timely raised if made in the motion for new trial. *Hudson v. Carr,* 668 S.W.2d 68, 71, [5] (Mo. banc 1984). (See Appendix D, in Petitioner's initial Brief, where Rule 70.03

is set out.) This has always been the rule in the Missouri. Petitioner made its objection to the instruction in question in its Motion for New Trial. Respondent cannot contradict this nor does he attempt to. Secondly, Respondent attempts to use a recent Missouri Supreme Court case, *Fowler v. Park Corporation,* 673 S.W.2d 749 (Mo. banc 1984), to argue that any instructional error has been waived.

A reading of *Fowler* on the instant issues shows it is inapposite to this case. In *Fowler,* the trial court requested defense counsel to state on the record if he had any objections to the instructions. He replied that "he didn't see anything wrong with them, ..." *Fowler v. Park Corporation,* 673 S.W.2d at 756. Counsel also submitted converse instructions to the instruction (definition of negligence) challenged on appeal. *Id.* The two most crucial observations by the Missouri Supreme Court in *Fowler* were that counsel had not merely withheld an objection to the instructions offered by plaintiff and that if defendant counsel had offered the alternative definition of negligence, the trial court would have had the opportunity to correct the error and "undoubtedly" would have done so. *Fowler v. Park Corporation,* 673 S.W.2d at 756.

In the case at bar, Petitioner's counsel objected to the giving of M.A.I. 8.02 at the instructions conference and tendered an alternative instruction (see Appendix E, Petitioner's initial Brief, p. A-21, where the trial court refused Instruction D and Instruction H, offered by counsel for Petitioner) (see also *Dickerson v. St. Louis Southwestern Railway Co.,* 674 S.W.2d at 171, n. 3, where Instruction H is set out.)

The arguments made here with respect to *Fowler v. Park Corporation, supra,* are equally applicable to *Hudson v. Carr,* 668 S.W.2d 68 (Mo. banc 1984) also cited by Respondent. Counsel in *Hudson* also failed to make any objection to the instruction and failed to tender an alternative instruction. *Hudson v. Carr,* 668 S.W.2d at 71 [5]. That is certainly not the case here.

Respondent also claims that Petitioner's third Question Presented is not preserved for review. Petitioner did, in fact, argue to the Missouri Court of Appeals that the excessive verdict in this case resulted in great part because of improper jury instruction. In Point XII of its Argument to the Court of Appeals, Petitioner argued in part as follows:

> A major factor in this excessive verdict is that the jury was improperly instructed. Defendant illustrated earlier that *federal law mandates that the jury be instructed to reduce any award to present value.* Moreover, the verdict director (Instruction No. 6) and the damages instruction (Instruction No. 9) permitted the jury to speculate and to take into account matters beyond the proper scope of their consideration. (emphasis added)

(Petitioner's Appellant's Brief before the Missouri Court of Appeals, Eastern District, page 59.)

It is obvious that the issue of the present value instruction was raised to the Court of Appeals. That court did not hold that petitioner had failed to preserve the present value instruction aspect of this point, but rather ruled on the point as an entirety and must have held that the issue was properly preserved. *Dickerson v. St. Louis Southwestern Railway Co.,* 674 S.W.2d at 173 [19].

STATEMENT OF THE CASE

Petitioner does not intend to endorse or approve of Respondent's Statement of the Case by deciding not to reply to the same here. In the interest of devoting its time to what it considers more important issues for this Petition for Writ of Certiorari, Petitioner chooses not to reply to Respondent's Statement of the Case.

REASONS FOR ISSUING THE WRIT

I.

Despite Respondent's obvious desire to have the law be to the contrary, there is no doubt that an FELA defendant in a state court has a fixed federal right to have a present value instruction submitted to the jury. *Jones & Laughlin Steel Corp. v. Pfeiffer,* ____ U.S. ____, 76 L.Ed.2d 768, 103 S.Ct. 2541 (1983). In *Jones & Laughlin Steel Corp. v. Pfeiffer, supra,* this Court made clear that the legal measure of damages is that a person is entitled to be compensated for future lost wages "reduced to its present value". 76 L.Ed.2d at 780. This Court considered a variety of discounting methods or theories in *Jones & Laughlin Steel Corp. v. Pfeiffer,* but it never waivered from its long-held position that a lost wages award must be discounted.

As pointed out in Petitioner's initial Brief, the court gave renewed liability to *Chesapeake & Ohio Railway Co. v. Kelly,* 241 U.S. 45, 491, 36 S.Ct. 630, 60 L.Ed. 11117 (1916), where this Court held that an FELA defendant has a right as a matter of federal law to an instruction telling the jury that they are to award damages on the basis of present value or money value only. *Jones & Laughlin Steel Corp. v. Pfeiffer,* ____ U.S. ____, 76 L.Ed.2d at 783. (Petitioner's Brief at 7). Although certain of the theories resulted in "total offset" the Court never held that no discounting formula need be applied or considered. On the contrary, this Court reversed the case because no present value instruction had been given even though the petitioner had "insisted that if compensation was to be awarded it 'must be reduced to present value.' " *Jones & Laughlin Steel Corp. v. Pfeiffer,* 76 L.Ed.2d at 792.

Respondent asserts that Petitioner failed to preserve this issue because it did not offer any evidence of present value. Respondent has failed to cite any authority requiring that evidence of present value must be offered. No evidence or offer of proof need be introduced to support a present value instruction. *Dun-*

can v. St. Louis-San Francisco Railway Co., 480 F.2d 79, 87 (8th Cir. 1973) (no evidence of present value needed; jurors are presumed to be able to award only "money value"); *Chesapeake & Ohio Railway Co. v. Kelly,* 241 U.S. 45, 489-490, 36 S.Ct. 630, 632, 60 L.Ed. 1117 (1916) (court stated that "it is self-evident that a given sum of money in hand is worth more than a like sum payable in the future.") Furthermore, in December, 1982 when this case tried in the Circuit Court for the City of St. Louis, Missouri, the Missouri Supreme Court had by decision prohibited both present value argument and evidence of present value because they were beyond instructions given by the court. *Dunn v. St. Louis-San Francisco Railway Co.,* 621 S.W.2d 245, 254 (Mo. banc 1981). Therefore, counsel for Petitioner was prohibited by Missouri law at the time of trial of this case from arguing present value to the jury and from introducing any evidence of present value.

Contrary to Respondent's assertion, the denial of Petitions for Writ of Certiorari by this Court are not to be used as authority for his position. *Maryland v. Baltimore Radio Show, Inc.,* 338 U.S. 912, 94 L.Ed. 562, 70 S.Ct. 252 (1950). In *Maryland v. Baltimore Radio Show,* this Court made clear that the "sole significance of such denial of a Petition for Writ of Certiorari . . . simply means that fewer than four members of the court deemed it desirable to review a decision of the lower court as a matter 'of sound judicial discretion.' " 338 U.S. at 917. Consequently, "such a denial carries with it no implication whatever regarding the court's views on the merits of the case which it has declined to review." 338 U.S. at 919. Further, Respondent fails to even point out what prior cases there were and what issues they involved.

Respondent next attempts to confuse procedure with substantive law by claiming that the Missouri Approved Instruction system properly excludes the present value instruction because jury instructions are governed by state procedure. Respondent ignores that the issue here is one of federal law—damages in an

FELA case, a federal cause of action, capable of being brought in state court. Questions of measure of damages under the FELA are governed by federal law even if the action is brought in state court. *Norfolk & Western Railway Co. v. Liepelt,* 444 U.S. 490, 493, 100 S.Ct. 755, 62 L.Ed.2d 689, 693 (1980). Contrary to this, Respondent proposes that the legal measure of damages in an FELA case is different if the case is brought in state court than if the case is brought in federal court. There is no authority for this position, nor does Respondent cite any.

The point here is that Petitioner's *right* to have a present value instruction submitted to the jury is being thwarted by the Missouri Approved Instruction system which the Missouri Supreme Court has declared does not allow it to be given to the jury. *Bair v. St. Louis-San Francisco Ry. Co.,* 647 S.W.2d 507, 510 [3] (Mo. banc 1983). This is not a discussion over different ways of submitting the instruction for present value—it is one of whether the state of Missouri must give it through its own courts.

II.

In arguing that this Court should deny Petitioner's Petition for Writ of Certiorari, Respondent again ignores the well-recognized rule that denial of a Petition for Writ of Certiorari in the past is not precedenital authority for denying other Petitions for Writ of Certiorari that may raise similar issues. *State of Maryland v. Baltimore Radio Show,* 338 U.S. 912, 70 S.Ct. 252 (1950).

Respondent's attempt to justify the language of M.A.I. 8.02 under state and federal law fails. He argues that this instruction on damages should be governed by state procedure and state law, but neglects to point out that every other damages instruction in the Missouri Approved Instruction System requires a "*direct* result" between a plaintiff's damage and a defendant's conduct. (See Petitioner's Brief, pp. 10-15.) As petitioner points out in its initial Brief to this Court, it is anathema under

Missouri state law to have a damages instruction which does not require this direct causal link. (Petitioner's Brief at 13.) *Brown v. St. Louis Public Service Co.*, 421 S.W.2d 255, 257 (Mo. banc 1957).

The failure of M.A.I. 8.02 to have the word "direct" in its causal phrasing is heightened by the fact that the M.A.I. system provides no other damage instruction or information to be given to the jury on the issue of damages. For example, no instruction identifying or listing the proper elements of damages is permitted by the Missouri Approved Instructions. M.A.I. 8.02 is the exclusive and sole damages instruction given to a jury in an FELA personal injury case in a Missouri state court. This is especially crucial in a case such as this one where Respondent's spouse testified about how her life was more difficult and how Respondent was "not the same man" and that their marriage was deteriorating after the injury-causing incident. See *Dickerson v. St. Louis Southwestern Ry. Co.*, 674 S.W.2d, at 171-172. This is obviously an attempt to get an award for loss of consortium which is prohibited in FELA cases [E.g., *Kelsaw v. Union Pacific Railroad Co.*, 686 F.2d 818 (9th Cir. 1982)] and no instruction in the M.A.I. could be given to the jury to tell them so.

Respondent's argument merely repeats Petitioner's and fails to mention the anomaly between M.A.I. 8.02 (without the causal requirement of a "direct result") and M.A.I. 8.01 (with the causal requirement of a "direct result"). (See Petitioner's Brief at pp. 14-15.)

III.

Petitioner will reply on only two points. First, this is not the first time Petitioner has argued that the trial court's refusal of the present value instruction contributed to the excessive verdict in this case. This point was made to the Missouri Court of Appeals in Petitioner's Appellant's Brief. (See p. 6, *supra*). Second, the significance of the improper closing argument of Respondent's counsel is that it illustrates that the concept

of present value of damages in FELA cases in Missouri state courts is not only being ignored by Missouri courts but completely run over roughshod. Counsel for plaintiff is allowed to argue inflation and raises in a plaintiff's salary, but an FELA defendant cannot instruct the jury that they are to award only "money value" as required by this Court in numerous decisions as cited earlier and in Petitioner's Brief.

Unless this Court grants this Petition for Writ of Certiorari and forces Missouri courts to give a present value instruction, when requested, to juries in FELA cases tried in the state courts of Missouri, this gross violation of federal law will continue.

Respectfully submitted,

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APPENDIX

EXHIBIT M

Point VI Respondent Dickerson's Brief filed in this case before the Missouri Court of Appeals, Eastern District.

POINT VI

The Trial Court Did Not Err In Giving M.A.I. 8.02 Because Said Instruction Does Not Deprive Defendant Of The Equal Protection Guarantees Provided By The Missouri And The United States Constitutions.

Defendant claims err [sic] in the giving of M.A.I. 802 [sic] claiming that the instruction violates the equal protection clauses of the Missouri and United States Constitutions in that it improperly discriminates between railroad defendants and F.E.L.A. wrongful death and personal injury claims. A review of defendant's motion for new trial and, in particular, Point 12 will reveal that defendant's claim to err [sic] has not been preserved for ruling by this Court. Nowhere in defendant's motion for new trial did it raise the equal protection claim that defendants in personal injury actions under the F.E.L.A. were discriminated against irrationally and on an unreasonable basis when compared with the defendants in an F.E.L.A. action for wrongful death. The defendant in its motion for new trial stated:

> ...in compelling the use of said instruction (M.A.I. 802 [sic]), the Supreme Court of Missouri has deprived defendant of its rights under the equal protection of laws provision of the United States Constitution Fourteenth Amendment and the Missouri Constitution, Article 1, Section 2 and has deprived defendant of its property without due process of law in violation of defendant's rights under the Missouri Constitution, Article 1, Section 10 and has denied defendant its rights under the Federal Employer's Liability Act, 45 U.S.C.A., Sections 51 *et seq.* In that defendant is liable on damages only for injury, or death, resulting in

whole or in part from its negligence, in violation of defendant's rights under Article 6, Clause 2 of the United States Constitution." (L.F. 19-20).

Defendant did not raise in its motion for new trial the discrimination between F.E.L.A. defendants in personal injury actions and wrongful death actions. Defendant cannot now be heard to complain of the constitutional ramifications of such classification at this time. *Independent Stave Company v. State Highway Commission of Missouri,* 625 S.W. 2d 246, 249 (Mo. App. 1981). Since defendant did not raise the constitutional question at its first opportunity and renew it in its motion for new trial, it is forever barred from raising the constitutional question to this Court.

In addition, as noted previously, our Supreme Court sitting in banc in *Bair v. St. Louis-San Francisco Railway Company,* 647 S.W. 2d 507 (Mo. banc 1983), and in *Dunn v. St. Louis-San Francisco Railway Company,* 621 S.W. 2d 245 (Mo. banc 1981) has held that M.A.I. 8.02 is the proper damage instruction to be given in F.E.L.A. personal injury action. Defendant's contentions to the contrary are without merit. (See also *Marshell v. Burlington-Northern, Inc.,* 637 S.W. 2d 168 (Mo. App. 1982) and *Fisher v. Burlington-Northern, Inc.* 640 S.W. 2d 174 (Mo. App. 1982).